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Summary record of the 878th meeting
Held at Headquarters, New York, on Tuesday, 24 June 2008, at 3 p.m.

Chairperson: Mr. Illescas ..... (Spain)

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08-39735 (E)

The meeting was called to order at 3.10 p.m.

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (*continued*) (A/CN.9/642, A/CN.9/645 and A/CN.9/658 and Add.1-13; A/CN.9/XLI/CRP.6)

Draft article 92 (Reservations)(continued)

1. **The Chairperson** invited the Commission to resume consideration of the Austrian and German delegations' proposal to replace the text of draft article 92 with two new paragraphs that would allow States to exclude application of the draft convention to contracts that provided for carriage by sea and by other modes of transport in addition to sea carriage (A/CN.9/XLI/CRP.6).

2. **Mr. von Ziegler** (Switzerland) said he realized that the purpose of the proposal was to allow as many States as possible to adhere to the draft convention, thereby replacing the proliferation of competing instruments with a single instrument that reflected the needs of the trade. However, the proposal would simply lead to another proliferation — that of reservations — which would do nothing to harmonize law. Some delegations had maintained that the freedom of contract allowed under some provisions of the draft convention would also pose an obstacle to harmonization. However, the 1980 United Nations Convention on Contracts for the International Sale of Goods, which provided for similar freedom of contract, had not had that effect. If some contracting States opted for the reservation, he could foresee major problems in determining whether the convention applied to a given contract of carriage, depending on where the forum was and whether the place of receipt and the place of delivery were in different States.

3. **Mr. Nguema Assoumou** (Gabon) said that he associated himself with the representatives of Senegal, Côte d'Ivoire and other States that had stressed the need to work towards the harmonization of national legal systems. The Commission should adopt the solution that would be acceptable to the greatest number of delegations, but his delegation could not support the proposal.

4. **Mr. M'inoti** (Kenya) said that his delegation, like many others, was satisfied with some provisions of the draft convention and had concerns about others. However, the proposal would not solve that problem, and it would be preferable to leave draft article 92 unchanged.

5. **Mr. Beare** (Observer for the Comité Maritime International) said he was aware that the proposal raised policy issues that should be decided by Governments. However, he wished to place his organization's position on record. For the past seven years, the Comité Maritime International, which represented national maritime associations throughout the world, had taken the consistent view that in order to modernize maritime law and facilitate current commercial practice, the draft convention should cover door-to-door transport. It had taken that position during the preparation of the preliminary draft of the convention, which had subsequently been revised and considerably improved by the Working Group. The proposed amendment to draft article 92 would not promote harmonization and would lead to uncertainty, particularly regarding the mandatory scope of the convention with regard to contracts such as those currently concluded on well-known trade forms such as COMBICON and MULTIDOC.

6. **Ms. Mbeng** (Cameroon) said that some of the sponsors' views coincided with those expressed in document A/CN.9/658/Add.1, which contained the comments of a number of African States. Her delegation had initially considered that making the draft convention applicable to door-to-door operations would have serious legal consequences for many countries of her region, among other things by placing a heavier burden of proof on the claimant in most cases, and that small-scale operators, especially transport intermediaries, would be forced out of existence by the major operators. However, after hearing the speakers who had argued for the need for a global harmonized instrument, she had come to believe that the draft article should remain in its current form.

7. **Ms. Flores** (Venezuela) said that her delegation, too, would prefer to leave draft article 92 unchanged.

8. **Mr. Schelin** (Observer for Sweden) said that, at the previous meeting, he had sensed that many delegations might be willing to compromise on the issues of limits of liability and multimodal transport. He would therefore like to make a last attempt to broaden the consensus on those matters by proposing a new draft article 92 bis (Special declarations) which would read:

"A State may according to article 93 declare that:

(a) it will apply the Convention only to maritime carriage; or

(b) it will, for a period of time not exceeding 10 years after entry into force of this Convention, substitute the amounts of limitation of liability set out in article 61, paragraph 1, by the amounts set out in article 6, paragraph 1(a), of the United Nations Convention on the Carriage of Goods by Sea concluded at Hamburg on 31 March 1978. Such a declaration must include both amounts."

9. That proposal should be considered as a package since it covered both the issues that he had mentioned. Unlike the proposal made by the delegations of Austria and Germany, it would allow States to stipulate that the draft convention would apply only to the port-to-port (maritime) carriage portion of multimodal operations that also included land transport, an option available also under the Hague, Hague-Visby and Hamburg Rules. It might be argued that such an approach would be detrimental to uniformity, but it would trigger ratification by a number of States that had stated that they were not in favour of a multimodal convention and would thus increase the chances of arriving at uniform rules, at least for the maritime portion of the transport. If the current text remained unchanged, there was a risk that many States would refuse to ratify the draft convention. The result would be a situation in which there would be not three, as at present, but four sets of rules with no uniformity even for the maritime leg of the operation.

10. He believed that if States had the option of making a special declaration upon ratification of the instrument, many of them might not make use of it. But if that option was not available, strong shipping interests in those States might well prevent ratification. The proposal was also an attempt to reassure delegations that were in favour of setting high limits of liability since those levels would, in fact, be reached no later than 10 years after the entry into force of the draft convention. It should be borne in mind that if the convention was not ratified by the States that wanted to set lower limits, the Hague-Visby Rules, which set a limit far lower than that of the Hamburg Rules, would become the dominant system in practice.

11. His delegation's proposal also had the merit of leaving the compromise reached in the Working Group untouched since the draft convention would still cover door-to-door transport and would leave the limits established in draft article 61 unchanged, subject to a transitional period and to the option not to apply them to multimodal transport.

12. **Ms. Carlson** (United States of America) said that she was grateful for the Swedish delegation's attempt to find a compromise solution. She agreed that the Commission's goal was to achieve the broadest possible ratification of the draft convention; however, she had more faith in the draft convention than the representative of Sweden did and was convinced that the best way to achieve broad ratification was to honour the compromise reached over the course of six years of negotiations. It was somewhat disingenuous to say that the new article would not affect the compromise package agreed in the Working Group (A/CN.9/WG.III/XXI/CRP.5) since multimodal transport and the agreed limits of liability were essential elements of that package. The proposal would not promote wider ratification and would undermine uniformity by allowing States to limit the convention's applicability to maritime carriage.

13. From the procedural point of view, she did not think that the Swedish proposal should be discussed until the Commission had taken a decision on the proposal submitted by the delegations of Austria and Germany.

14. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said he agreed with the representative of the United States of America that the compromise package would be undermined by either of the two proposals; it appeared that the great majority of delegations were in favour of leaving draft article 92 unchanged.

15. **Mr. Mbiah** (Observer for Ghana) said that he appreciated the Swedish delegation's effort to find a compromise acceptable to all. However, he could not support such a "back-door" approach, which would introduce new elements at a late stage of the negotiations and revise limits that had already been agreed. The proposal would create general uncertainty as to the state of the law on matters covered by the draft convention; as he had stated at the previous meeting, it was important not to create a situation in which States could select only the elements of the convention that suited them. Furthermore, the proposed 10-year transition period was an arbitrary one for which no justification had been presented. Lastly, the

explanation provided by the representative of Sweden should have been submitted in writing, together with the proposal, as a conference room paper so that delegations could consider the consequences of the proposed new draft article.

16. **Mr. Morán Bovio** (Spain) said that his delegation would prefer not to introduce the special declarations envisaged in the Swedish proposal. Past experience had shown that many factors influenced States' ratification of an international instrument; time would show whether it would achieve broad acceptance.

17. **Mr. Berlingieri** (Italy) said that, while he appreciated the Swedish delegation's efforts, like previous speakers he rejected the proposal. Speaking on a point of order, he said that the Commission should finish discussing draft article 92 before it discussed the proposed draft article 92 bis.

18. **The Chairperson** agreed that, in order to avoid confusion, the Commission should finish its discussion of draft article 92 and the Austrian and German proposal contained in A/CN.9/XLI/CRP.6 before discussing the Swedish proposal. He invited any delegations still wishing to speak on draft article 92 to do so.

19. **Ms. Czerwenka** (Germany), supported by **Mr. Hu** Zhengliang (China), said that the issue under discussion was extremely important. Every effort should therefore be made to ensure that those major trading partners represented at the meeting could tell their respective Governments that the convention reflected an appropriate compromise and should be ratified.

20. During the discussion of the Austrian and German proposal (A/CN.9/XLI/CRP.6), a number of delegations had expressed their willingness to work towards a compromise. That meant looking for alternatives, not rejecting a text simply on the basis of a vote count. If the Commission wished to reach a compromise, it should consider all the proposals put forward thus far.

21. In that regard, she expressed appreciation to the Swedish delegation for trying to come up with a new proposal to address the various concerns. The Swedish proposal did at least contain one element, if not all elements, of the Austrian and German proposal. In a spirit of compromise, her delegation was more than willing to continue searching for a compromise acceptable to all delegations, whether in the plenary meeting or in informal consultations.

22. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that the reference to trading partners was inappropriate. Some delegations were in favour of the draft article and some were not; it was as simple as that. He urged the Chairperson to close the discussion on draft article 92 so that the Commission could move forward.

23. **The Chairperson** noted that, while a considerable number of delegations were in favour of replacing the current version of draft article 92 with the text contained in A/CN.9/XLI/CRP.6, an even larger number of delegations were in favour of leaving draft article 92 unchanged. In line with usual practice, the current version of draft article 92 should therefore be retained.

24. *Draft article 92 was approved in substance and referred to the drafting group.*

25. **The Chairperson** invited further comments on the draft article 92 bis proposed by the representative of Sweden.

26. **Ms. Halde** (Canada) said that her delegation welcomed the Swedish delegation's proposal and sympathized with its efforts to unify the law and reach out to States that would otherwise be unable to ratify the convention.

27. **Mr. Delebecque** (France) and **Mr. Tsantzalos** (Greece) expressed support for the position of the United States and Senegal.

28. **Mr. Bigot** (Observer for Côte d'Ivoire) said that the Swedish proposal, if adopted, would result in an even more fragile compromise. He could not therefore support the proposal, for the reasons mentioned by the United States and Senegal.

29. **Mr. Serrano Martinez** (Colombia) said that, in view of the overwhelming support for and recent approval of draft article 92, the Swedish proposal was no longer valid.

30. **Mr. Sandoval** (Chile) said that the Swedish proposal was unacceptable in terms of both form and content.

31. **Mr. Maradiaga** (Honduras) said that his delegation questioned whether the rules of procedure allowed for a whole new article to be added to the draft

convention, as in the Swedish proposal, and could not, therefore, support the proposal.

32. **Mr. van der Ziel** (Observer for the Netherlands) said that the Swedish proposal was a very innovative idea and a perfect example of a compromise that accommodated States with strong views on the subject while minimizing the impact on others. In principle, his delegation would favour such a compromise. He would, however, like to see the proposal in writing first, so as to be able to consider it properly.

33. At first sight, for example, subparagraph (a) of the Swedish proposal seemed to repeat paragraph 1 of the Austrian and German proposal; with further consideration, however, it might be possible to find less far-reaching wording that still accommodated the concerns of those States in favour of the proposal.

34. As to subparagraph (b) of the Swedish proposal, he failed to see how it would affect decisions relating to draft article 61. If he had understood the proposal correctly, it would simply enable those States that objected to the amounts of limitation of liability set out in article 61, paragraph 1, to ratify the convention earlier than they would have done otherwise.

35. **Ms. Sobekwa** (South Africa) proposed that interested delegations should meet informally in order to draft a new compromise version of draft article 92 bis. The situation would be resolved only if the Commission found a compromise that was acceptable to all delegations.

36. **The Chairperson** reiterated that issues relating to legislative policy should be decided in the plenary meeting.

37. **Ms. Shall-Homa** (Nigeria) said that the Commission was opening a Pandora's box. Many delegations could point to issues that had not been resolved as they had hoped; if the proposed draft article 92 bis was discussed any further, any number of other "special declarations" might be proposed. Her delegation agreed with previous speakers that the matter should be closed.

38. **Ms. Downing** (Australia) said that, while she appreciated the Swedish delegation's efforts, she agreed with the United States and Senegal that the Swedish proposal undercut the compromise reached in the Working Group. That compromise, while not binding on the Commission, had been agreed as a package. If any of the elements of that package were changed, all other elements should then be up for discussion.

39. **Mr. Orfanos** (Observer for Cyprus) said that his delegation could not support the Swedish proposal.

40. **Ms. Markovčić Kostelac** (Observer for Croatia) said that she was unable to discuss the proposal until she had seen it in writing.

41. **Mr. von Ziegler** (Switzerland) said that the Swedish proposal was not a compromise in the true sense; rather, it reflected the fact that sometimes compromises were not possible, since it introduced the possibility of deviations from certain provisions of the draft convention. The provision allowing a State to substitute the amounts of limitation of liability set out in article 61, paragraph 1, by other amounts was very creative but if States were allowed to make special declarations, it would be difficult to know exactly which amounts applied at any given time. Furthermore, it was not clear what would happen at the end of the 10-year period. The insertion of a new chapter to clarify the procedure to be followed, while one possibility, was not worthwhile in his view.

42. Many compromises had been made on key issues, including on limitation of liability. Those compromises should be respected. The door-to-door aspect of the draft convention had been decided at an early stage. To conclude, the Swedish proposal did not have his delegation's support and need not be issued in writing. To postpone a decision would not be helpful, for the reasons explained by the representative of Nigeria.

43. **Mr. Mollmann** (Observer for Denmark) said he thought that a decision could be taken without waiting for a written text. His delegation understood Sweden's proposal for a draft article 92 bis but could not support it. With regard to subparagraph (a) of the proposal, although phrased somewhat differently it was similar enough to the proposal of Austria and Germany contained in A/CN.9/XLI/CRP.6 that the comments already made by delegations in that regard were applicable. The second part of the proposal was innovative, but his delegation could not accept it for the reasons stated by the representative of Australia.

44. **Mr. Blake-Lawson** (United Kingdom) and **Mr. Bokama Olenkongo** (Observer for the Democratic Republic of the Congo) said that their delegations agreed with those that did not wish to change draft article 92 or add a draft article 92 bis.

45. **Mr. Sharma** (India) said with regard to subparagraph (a) of Sweden's proposal that, although his delegation was willing to discuss some of the problems concerning multimodal transport in draft article 27, it did not wish to allow for a reservation or declaration that would change the nature of the draft convention. With regard to subparagraph (b) of the proposal, as many delegations had said, the limits of liability in draft article 61 were part of a compromise package. The proposal for two layers of liability limits was creative but would not strengthen the maritime field. It would not be clear to users of the system when the various declarations would begin and end and what amount of limitation would apply to a given country at a given time. For all those reasons his delegation could not support the proposal.

46. **Ms. Czerwenka** (Germany) said that her delegation supported Sweden's proposal for a new draft article 92 bis.

47. **The Chairperson** said he took it that the majority of the Commission did not wish to approve the proposed draft article 92 bis.

48. *It was so decided.*

The meeting was suspended at 4.25 p.m. and resumed at 5 p.m.

Draft article 93

49. **Ms. Halde** (Canada) said that a minor technical correction was necessary in draft article 93, paragraph 1, second sentence, which read: "The declarations permitted by article 94, paragraph 1, and article 95, paragraph 2, should be made at the time of signature, ratification, acceptance, approval or accession." As it happened, paragraph 1 of draft article 94, which concerned a declaration by a contracting State with two or more territorial units that the convention was to extend to all its territorial units or only to one or more of them, permitted the contracting State to amend its declarations "at any time". The inconsistency between the two provisions could be corrected by referring to "the initial declaration" in draft article 93, paragraph 1.

50. **Mr. Morán Bovio** (Spain) said that his delegation could support the proposal of Canada, which, having a provincial system, would naturally be alert to such situations.

51. **Ms. Downing** (Australia) said that her delegation supported the Canadian proposal.

52. **Ms. Carlson** (United States of America) said that the point raised was not an issue for her delegation, since it did not intend to take advantage of draft articles 94 and 95, but it appeared that a similar situation prevailed with respect to declarations permitted by draft article 95, paragraph 2.

53. **Mr. Delebecque** (France) agreed that under draft article 95, paragraph 2, a regional economic integration organization was required to make not only an initial declaration but subsequent declarations as well. The adjective "initial" therefore applied to declarations under draft article 95 as well as those under draft article 94 and could simply be inserted before the word "declarations" in the second sentence of draft article 93, paragraph 1.

54. *Draft article 93, as amended, was approved in substance and referred to the drafting group.*

Draft article 94

55. **Ms. Halde** (Canada) said that her delegation wished to propose an amendment to the so-called "federal clause", specifically to draft article 94, paragraph 3, for the sake of consistency with other conventions, such as those of the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Convention on Choice of Court Agreements. Draft article 94 had been drawn directly from the text of the article 93 of the United Nations Convention on Contracts for the International Sale of Goods. The purpose of paragraph 3 of the provision in the Sales Convention was to provide an interpretation of the term "place of business" so that it would be tied to a territorial unit of a State rather than the State as a whole for purposes of the scope of application of the Convention. For example, if Canada became a party to the Sales Convention and declared that it extended to some of its territorial units but not to Saskatchewan, in the case of a sales contract between a company in Chile and a company in Saskatchewan the convention would not apply, and paragraph 3 would make that clear.

56. However the term "place of business" found in draft article 94, paragraph 3, was not used elsewhere in the draft convention, except in the definition of "domicile". The key notion that required interpretation in order to be able to see clearly how the convention rules would apply if the convention did not extend to

all the territorial units of a contracting State was the location of several connecting factors in a contracting State. In draft article 5, paragraph 1, for example, the connecting factors that determined the scope of application of the convention were the location of the place of receipt, the port of loading, the place of delivery or the port of discharge in a contracting State. Other provisions that set out connecting factors were draft article 1, paragraph 28, draft article 20, paragraph 1 (a), and draft article 69, paragraph 1 (b). Her delegation therefore proposed to amend to draft article 94, paragraph 3, to read:

> "If, by virtue of a declaration pursuant to this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the relevant connecting factor for the purposes of article 1, paragraph 28, article 5, paragraph 1, article 20, paragraph 1 (a), and article 69, paragraph 1 (b), is considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends."

Other drafting approaches could be taken, but the above suggestion was relatively simple and not inconsistent with drafting approaches used elsewhere.

57. **Ms. Czerwenka** (Germany) said that her delegation supported the substance of the proposal, provided it was drafted carefully in order to fit with the rest of the draft convention. For example, in draft article 5, not all of the connecting factors mentioned needed to be located in the contracting State for the convention to apply, and if one of them was located in another contracting State, the convention would apply in any case. The words "located in that State", which appeared in the current text, were missing from the new proposal. Some careful drafting was in order but that could be handled by the drafting group.

58. **Mr. Miller** (United States of America) said that his delegation agreed with the substance of the Canadian proposal. Although the draft article had no impact on the United States, his delegation was happy to accept its inclusion since it was important to his country's largest trading partner. He agreed with the representative of Germany that there were some drafting details to be worked out. The real issue was not that the connecting factors were in a contracting State but that the places mentioned in the relevant articles would not be considered to be in a contracting State if they were located in a territorial unit excluded from the convention. In the hypothetical example in which Canada, in a declaration under article 94, excluded Saskatchewan, that would mean that a shipment originating in Saskatchewan would not for that reason alone be covered by the convention, although a shipment from Saskatchewan to a contracting State would be covered; and for the purposes of article 69, Saskatchewan would be excluded as one of the available forums, so that the convention would not guarantee access to a Saskatchewan court. With that understanding of the Canadian proposal, his delegation thought that it was a good suggestion and that appropriate language should be worked out to give effect to it.

59. **Mr. Morán Bovio** (Spain) supported the Canadian proposal in principle. The drafting group should determine the new wording.

60. **Mr. Sato** (Japan) said that although draft article 94 was not significant for Japan, his delegation supported the Canadian proposal in the interest of all countries that required a federal clause. A change in draft article 94, however, was relevant not only to the four other provisions already mentioned, but perhaps to others as well in which there was a reference to a contracting State, such as draft article 1, paragraph 29. That technical issue should be carefully scrutinized by the drafting group.

61. *Draft article 94, as amended, was approved in substance and referred to the drafting group for redrafting to reflect the debate.*

Draft article 95

62. **Mr. Imorou** (Benin) proposed deleting the first part of the last sentence of paragraph 1, "When the number of Contracting States is relevant in this Convention", retaining simply the statement that a regional economic integration organization did not count as a contracting State. Logically, then, paragraph 3, which essentially equated a contracting State and a regional economic integration organization, should also be deleted.

63. **Ms. Czerwenka** (Germany) said that it was important to retain both paragraph 1 and paragraph 3 as drafted. Benin's concerns were addressed in paragraph 1, which specified the instances in which a regional economic integration organization did not count as a contracting State.

64. **Mr. Morán Bovio** (Spain), concurring with the German delegation, observed that the inclusion of draft article 95 had been prompted by recent conventions such as the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention), which also facilitated certain kinds of joint action by States through supranational regional organizations. The provision, which in any case limited the involvement of a regional economic integration organization in the last sentence of paragraph 1, was in no way detrimental to the draft Convention, even if it was never invoked.

65. **Mr. Sharma** (India) said that draft article 95 was intended to facilitate the inclusion of non-State entities which had the capacity to enter into contracts in matters covered by the draft Convention, when they were so mandated. Paragraphs 1 and 3 should be retained as drafted in the interests of global trade and freedom of contract. He saw no need to change the text and, indeed, the very phrase in the third sentence of paragraph 1 that Benin wished to delete clarified the intention.

66. **Mr. van der Ziel** (Observer for the Netherlands), noting that his country was a member of a regional economic integration organization, said that he endorsed the remarks of Germany and Spain.

67. **Mr. Imorou** (Benin) said that what concerned his delegation was that draft article 95 put subregional organizations on a par with States.

68. **Mr. Bellenger** (France) said that his Government interpreted the phrase "When the number of Contracting States is relevant in this Convention," to mean that a regional economic integration organization would not be counted among the number of contracting States necessary for the entry into force of the Convention or for its amendment. His delegation supported the current text of draft article 95.

69. **Mr. van Houtte** (Observer for the European Commission) said that as a representative of a regional economic integration organization, he urged the Commission to maintain the wording of draft article 95 as it stood, since it envisaged the normal way in which regional organizations participated in instruments like the draft convention. If the initial clause of the third sentence of paragraph 1 was deleted, the rest of the sentence would be unclear.

70. **Ms. Carlson** (United States of America), observing that weight should be given to the opinion of one of the regional organizations in question, said that draft article 95 should be retained in its current form.

71. **Ms. Markovčić Kostelac** (Observer for Croatia) said that her delegation supported retaining the current text of draft article 95. The provision had become a standard clause in similar international conventions adopted in recent years.

72. *Draft article 95 was approved in substance and referred to the drafting group.*

Draft articles 96 (Entry into force), 97 (Revision and amendment) and 98 (Denunciation of this Convention)

73. *Draft articles 96 to 98 were approved in substance and referred to the drafting group.*

Draft article 84 (International conventions governing the carriage of goods by other modes of transport) (continued)

74. **Mr. Sato**, reporting on the informal consultations on draft article 84, explained, for the sake of those delegations uncomfortable with the text, that the article was needed because draft article 27 did not cover the conflict of conventions situations dealt with in draft article 84, where, notwithstanding draft article 27, the type of carriage of goods envisaged entailed the overlapping application of both the draft convention and one or another of the unimodal transport conventions, for example, when a road cargo vehicle was placed aboard a ship with goods loaded. Similarly, an amendment of limitation levels in one of the unimodal conventions, which was likely to happen in the near future, would conflict with the limits in the draft convention, and again draft article 27 would not suffice to resolve the conflict.

75. It had consequently been decided to amend the chapeau of draft article 84 by inserting after the phrase "in force at the time this Convention enters into force", the phrase "including any future amendment thereto". The proposed amendment did not allow broad incursions into the draft regime because the situations dealt with in each of the subparagraphs were strictly limited in scope. It served the important purpose of softening the overly restrictive current wording of the chapeau, allowing some flexibility for future development of the law through amendments to existing conventions. The text referred in only generic

terms to international conventions because, unlike the case of draft article 88, they were too numerous to be specifically listed.

76. *Draft article 84, as amended, was approved in substance and referred to the drafting group.*

The meeting rose at 6.05 p.m.